

DHFS HIPAA Communication	
Number: 10	Topic: Interplay between FERPA and HIPAA and the impact of HIPAA on FERPA-covered schools that electronically bill Medicaid for school based services.
Status: Final	
Date: 7/29/2003	

SUMMARY

There have been considerable questions raised related to the applicability of HIPAA in public schools that bill Medicaid electronically for School Based Services and the potential interplay between HIPAA and FERPA as a result of these schools conducting electronic billing activities. The financial and operational impact on these schools could be significant if they are required to comply with the privacy elements of HIPAA, including the requirements relating to workforce-training, distribution of a Notice of Privacy Practices, and the accounting of disclosures of HIPAA-protected health information. In addition, conflicts between various provisions of HIPAA and FERPA would likely create confusion during implementation and in ongoing operations and workflows.

After reviewing the legislative history of HIPAA as it relates to FERPA and the final, published HIPAA privacy rule, we believe that schools electronically billing Medicaid for school based services should comply with the privacy requirements of FERPA rather than those of HIPAA. In addition, FERPA-covered schools should comply with the transaction and code set standards of HIPAA as the Wisconsin Medicaid Program requires schools to submit HIPAA-compliant electronic claims.

On one hand, HIPAA provides an apparent exception to FERPA records. On the other hand, HIPAA is 'triggered' when electronic claims are submitted. This discrepancy creates an unclear picture for schools and providers and until such time as guidance is provided from the federal government, we are able to offer only a guarded opinion as the legislative comments and language of HIPAA indicate the intent to exclude FERPA records from the requirements of HIPAA. We believe this approach satisfies the legislative intent and spirit of the HIPAA legislation.

DISCUSSION

FERPA

FERPA defines and provides privacy protections for educational records when such records are held by educational institutions that receive federal funds. FERPA defines education records as those records, files, documents, and other materials that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution.

FERPA contains many provisions similar in intent and construct to those contained in HIPAA. The stated purpose of FERPA is to protect the privacy of parents and students, including their education records. This is similar to the purpose of HIPAA, which provides privacy protection for an individual's medical information. Similarly, like the HIPAA Notice of Privacy Practices, FERPA requires a "notice-like" Annual Notification that must include notice of rights, a right to inspect and to amend records. FERPA also requires a parent's consent to disclosures unless otherwise permitted by law and a right to file complaints.

Overall, FERPA, like HIPAA provides a wide-range of privacy protections to an individual's information and requires covered organizations to adhere to numerous standards targeted at providing confidentiality and treatment of information. Although a school nurse may be a health care provider and produce individually identifiable health information, that information, if available to other persons (i.e., insurance companies or other organizations) is considered to be an education record for purposes of FERPA, not a health record. The analysis presented here is limited to schools that provide school-based services and bill Medicaid electronically.

DHFS HIPAA Communication	
Number: 10	Topic: Interplay between FERPA and HIPAA and the impact of HIPAA on FERPA-covered schools that electronically bill Medicaid for school based services.
Status: Final	
Date: 7/29/2003	

HIPAA

HIPAA is intended to promote the confidentiality of individually identifiable health information and mandates covered entities and providers engaging in certain types of transactions to comply with the requirements of the privacy provisions of the rule. The drafters of the rule directly addressed FERPA within the framework of the rule at 45 CFR, § 164.501. In this section, HIPAA provides that Protected Health Information means:

Individually identifiable health information:

- (1) Except as provided in paragraph (2) of this definition, that is:
 - (i) Transmitted by electronic media;
 - (ii) Maintained in any medium described in the definition of electronic media at §162.103 of this subchapter; or
 - (iii) Transmitted or maintained in any other form or medium
- (2) Protected health information excludes individually identifiable health information in:
 - (i) Education records covered by the Family Educational Rights and Privacy Act, as amended, 20 U.S.C. 1232g; and
 - (ii) Records described at 20 U.S.C. 1232g(a)(4)(B)(iv)

Legislative History and Commentary on Application of the HIPAA Privacy Rule

The Preamble to the HIPAA privacy regulation included the following statement by the U.S. Department for Health and Human Services:

While we strongly believe every individual should have the same level of privacy protection for his/her individually identifiable health information, Congress did not provide us with authority to disturb the scheme it had devised for records maintained by educational institutions and agencies under FERPA. We do not believe Congress intended to amend or preempt FERPA when it enacted HIPAA. (Page 82483 of the December 28, 2000, Federal Register HIPAA final rule.)

Moreover, the concern for confusion and the specific legislative intent to adopt an approach that minimizes this potential was further addressed in the Preamble.

With regard to the records described at 20 U.S.C. 1232g(a)(4)(b)(iv) [FERPA], we considered requiring health care providers engaged in HIPAA transactions to comply with the privacy regulation up to the point these records were used or disclosed for purposes other than treatment. At that point, the records would be converted from protected health information into education records. This conversion would occur any time a student sought to exercise his/her access rights. The provider, then, would need to treat the record in accordance with FERPA's requirements and be relieved from its obligations under the privacy regulation. We chose not to adopt this approach because it would be unduly burdensome to require providers to comply with two different, yet similar, sets of regulations and inconsistent with the policy in FERPA that these records be

DHFS HIPAA Communication	
Number: 10	Topic: Interplay between FERPA and HIPAA and the impact of HIPAA on FERPA-covered schools that electronically bill Medicaid for school based services.
Status: Final	
Date: 7/29/2003	

exempt from regulation to the extent the records were used only to treat the student. (Page 82483 of the December 28, 2000, Federal Register HIPAA final rule.)

The U.S. Department of Education also supported the language contained in the HIPAA Preamble by releasing the following statement on February 25, 2002.

This Office has not published any guidance on the applicability of FERPA to HIPAA. However, we worked closely with the Department of Health and Human Services (HHS) on this issue during the rulemaking process. Because FERPA affords students adequate privacy protections, the Government agreed that records that are protected by FERPA should not be subject to HIPAA.

The overall thread of the legislative language and history suggests that the treatment of personal medical information held by schools was fully considered with a decision reached that such information would be covered only under FERPA because creating a ‘transformation’ process by which personal medical information would be subject to FERPA and then HIPAA based on its use, would unduly confuse and prove burdensome to providers.

Generally, HIPAA focuses on the use of the medical information, not on the creation of the information. Although in FERPA-covered schools, a “provider” creates the personal medical information necessary to produce an electronic claim, the clear language of the statute and the legislative comments and guidance clearly indicate that the school-based provider is not part of a HIPAA-covered entity and therefore neither the provider nor the personal medical information created falls under the scope of HIPAA for purposes of privacy.

Application of the HIPAA Transaction and Code Set Standards

When reviewing the applicability of the transaction and code set requirements of HIPAA in FERPA-covered school settings, the question is best answered not through a legal analysis, but through a business case lens. Although, the requirement is not directly addressed by HIPAA, the Wisconsin Medicaid Program presently requires schools submitting electronic claims to comply with HIPAA transaction and code set standards.